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UNION DUES

On Jan. 11, the U.S. Supreme Court heard oral argument in *Friedrichs v. California Teachers Association*, a case involving whether a state violates the First Amendment to the U.S. Constitution when it requires nonunion employees in unionized workplaces to pay a share of the administrative costs of union representation. In this Bloomberg BNA Insights article, union-side attorney Lee Adler examines whether public employees—such as school teachers, firefighters, and police officers—who choose not to join can be compelled to pay agency fees to a union that administers their labor contract, bargains for their raises and benefits, and protects their job security.

Free Speech, Free Riders and the Fate of the Union Agency Fee

By Lee H. Adler

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On Jan. 11, 2016, the U.S. Supreme Court heard oral argument in *Friedrichs v. California Teachers Ass'n*. This is a public sector collective bargaining case that landed quickly at the Court for resolution. The primary legal issue at stake is whether a state violates the First Amendment when it requires nonunion employees in unionized workplaces to pay their fair share of the administrative costs of union representation (*Friedrichs v. Cal. Teachers Ass'n*, U.S., No. 14-915, *oral argument* 1/11/16; 14 WLR 3, 1/15/16; .

As a practical matter, the issue is whether public employees—such as school teachers, fire fighters, and police officers—who choose not to join can be compelled to pay agency fees to a union that administers their labor contract, bargains for their raises and benefits, and protects their job security.

A second question before the Court is whether a public sector employee who objects to paying agency fees to a union must opt out of payment, or should the legal standard be that an employee is assumed "out" and must opt "in" if she wishes to pay dues to a public sector union. This writing primarily focuses on the first question before the Court.

What Is the *Abood* Precedent?

Almost 40 years ago, following a remarkable surge in public sector union organizing that rather quickly made these unions a political and legal force in the U.S., *Abood v. Detroit Board of Education*, 433 U.S. 209, 95 LRRM 2411 (1977), became the first major challenge to the constitutional propriety of a state or municipal government requiring public employees to pay their unions' dues. The Court fashioned a First Amendment ruling that respected each state's right to legislate a collective bargaining process for public

employees who were not covered by the 1935 National Labor Relations Act and its 1947 Taft-Hartley amendments.

In its decision, the Court specifically endorsed a state-legislated union dues payment structure, known as the “fair share fee” or “agency fee,” whereby an employee who chose to not join her union could be required to pay for the administrative costs of the union's mandatory obligation to represent her. The Court made it clear that such payment of monies by nonmembers would violate the First Amendment if the monies related to any of the unions' ideological or political objectives.

Thus, the Court established as central to the federal common labor law that governs the public sector workplace that requiring nonmembers to pay union dues only for administrative costs is constitutionally valid. The *Friedrichs* petitioners seek to overturn *Abood* because they believe that everything that a union does in its collective bargaining activities is political speech and that *Abood* incorrectly delineates a constitutional line that does not exist. Still, the sturdiness of this important First Amendment precedent manifested in any number of subsequent court decisions until the last few years.

One of those cases, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 137 LRRM 2321 (1991), which dealt with nonmember higher-education employees, included a key economic observation from one of the potential swing votes in *Friedrichs*, Justice Antonin Scalia. He noted in his concurring opinion that when a state government gives nonmembers a “legal entitlement,” such as a union's duty to represent them as if they were members, the state may “compel” the members “to pay the cost.” Justice Scalia was not shy about how to resolve the tension between full dues-paying members of the union and nonmembers who received the same benefits. He characterized the latter as “free riders whom the law requires the union to carry—indeed, requires the union to go out of its way to benefit, even at the expense of its other interests.”

Mounting Challenges to *Abood.*

Still, in the last few years, *Abood*‘s moorings have been strongly undermined, as the strategic balance earlier established and followed has been attacked by a new kind of First Amendment reasoning that prioritizes the “beliefs” of an individual anti-union employee over a state's interest in regulating its employees' labor relations collectively. This is best seen in Justice Samuel Alito's thinking in *Knox v. Service Employees Local 1000,* 132 S. Ct. 2277 193 LRRM 2641 (2012) (10 WLR 986, 6/22/12) and *Harris v. Quinn,* 134 S. Ct. 2618, 199 LRRM 3741 (2014) (12 WLR 1067, 7/4/14), both 5-4 decisions that many think invited the *Friedrichs* case.

Justice Alito's majority opinions in those cases assert that not only was *Abood* mistakenly decided, but, more critically, that requiring agency fee payments by nonmembers is state coercion of speech and association that cannot withstand the strict or exacting scrutiny required by the First Amendment. Alito wrote that states' decisions to allow exclusive union representation in governmental workplaces, with a corresponding duty to represent even nonmembers, and driven in part by the desire for efficiency of operations and workplace peace, fail to sustain the constitutionality of mandated agency fees in this new First Amendment analysis.

Nor has Justice Alito shown interest in considering any type of states' rights analysis within his compact rejection of *Abood*‘s longstanding legitimacy. Neither state laws nor collective institutions such as unions fare well under Alito's explanations, since he believes that each plays a role in unconstitutionally forcing nonmembers to associate with a union and involuntarily pay a fee for a service they don't believe in or want.

It is these views that the governmental and union respondents are pushing up against as they seek potential crucial swing votes in Justices Scalia and Kennedy. As we see below, neither Justice was particularly impressed by the respondents' arguments during oral argument, and neither sounded like a “swing” justice during that proceeding.

How *Friedrichs* Got to the Supreme Court

How this case came to the Court is unusual. Rebecca Friedrichs and other plaintiffs filed this action with the assistance of the Center for Individual Rights, a conservative legal organization, in mid-2013. They framed the case simply by telling the federal district court that dismissal was appropriate because the controlling precedent is *Abood*. The district court obliged, and the plaintiffs more or less took the same position on appeal. The Ninth Circuit agreed with the plaintiffs, bringing them very quickly to the Supreme Court's doorstep.

The Supreme Court took approximately six months to review the certiorari petition and reply, and then it granted review. Despite the respondents' requests, no court permitted any discovery, and the case arrives at the Supreme Court on the pleadings and briefs alone, along with myriad beliefs, arguments and constitutional philosophies contained in the amici briefs.

What Are the Petitioners After?

The petitioner school teachers want *Abood* overruled. They do not want to have to pay dues to a workplace organization they did not vote for or join. They believe that the undergirding or constitutional rationale for *Abood*, originally, was mistaken, and that recent U.S. Supreme Court decisions like *Knox* and *Harris* shattered its continuing validity. Even if *Abood* is not overruled, the petitioners point to Justice Alito's *Knox* reasoning that found unconstitutional a California union's opt-out requirement for nonmembers in a special dues assessment case. They assert that, at a minimum, nonmembers must be asked for and give their “affirmative consent” to any union dues payments; otherwise, such payments are unconstitutionally coerced.

The petitioners advance a succinct constitutional argument: forced by the state to pay dues to a workplace organization they do not wish to join or participate in involuntarily “subsidizes” a viewpoint that is political in its nature and thus political speech. Collective bargaining and union representation is political speech, they argue, because every grievance filed essentially “petitions” the government to change something in public workplaces, and every monetary demand in bargaining impacts the public purse. Quoting Justice Kennedy during oral argument in *Harris*, petitioners note that a “union's position” during bargaining that deals with money or spending by the government “necessarily affects the size of government ... which is a fundamental issue of political belief.” At the argument phase of this proceeding, Justice Kennedy reiterated this point time and again.

In each of its traditional *Abood*-protected administrative functions, petitioners argue, public sector unions are advancing a specific viewpoint that embodies political speech and thus requires the exacting scrutiny of the Court's First Amendment cases. According to petitioners, the fine line that *Abood* and its progeny drew is not only conceptually mistaken and constitutionally wrong; it is non-existent.

Since First Amendment jurisprudence requires an exacting scrutiny standard in compelled political speech cases, the respondents and their allies must show a sufficient state or policy reason to explain the propriety of such compulsion. Petitioners believe all of the Respondents' policy arguments, individually and cumulatively, are constitutionally insufficient.

The Position of the State and Its Educational Unions

Respondents' two primary briefs are those of the state of California and its educational unions. Each has the same primary objective: they seek to explain why *Abood* is a sensible and valid precedent. Defending a longstanding precedent is usually a good place for a litigant to be, but it seems different in this case.

California's writing carefully delineates the numerous ways that the state's workplaces gain benefit from its public-sector bargaining statute, of which mandating fair share or agency fees is but a small part. The

state's brief assists the reader in understanding both the value and the responsibilities that attend exclusive union representation in its public workplaces. One interesting point is a statutory requirement that both the union and the governmental employer must inform the public of their respective bargaining proposals *prior* to the onset of educational collective bargaining. That same statute also requires all school districts to adopt initial bargaining proposals at a public meeting and to disclose the outlines of their final agreements and likely costs *prior* to finalizing the agreements with the unions.

In this case, although California's laws require nonmember educational employees in a school district to pay the chargeable expenses (administrative costs of running the union, but not its political work), each union is required to notify nonmembers of their right to check a box stating they do not want to pay for any politically-related union expenditures. The nonmember is not required to give a reason for checking the box, and if a nonmember raises a concern about the classification of union expenditures, a prompt hearing is convened, and the union has the burden to show it is only seeking payment of “chargeable expenses.”

California's brief further explains that the state adopted its integrated collective bargaining legislation in 1975 as a way to deal with labor unrest and workplace inefficiencies. It found that the exclusive representation model worked best, reinforced by the requirements of each union having the duty to represent all educational employees, including nonmembers, and the reciprocal obligation of nonmembers to pay at least the “chargeable expenses” needed for the union to do its job. Although California recognizes that there is a small burden upon nonmembers' First Amendment rights in this paradigm, as did the *Abood* court nearly 40 years ago, it says the state-created model has served California's public employers and educational employees in quite helpful ways. None of the traditional jurisprudential explanations that justify overruling precedents like *Abood* are present here, California asserts, and important state interests continue to be advanced by its compromise legislation.

In one section of its brief, California asks whether nonmembers who choose the agency-fee route but are required by state law to receive the same representational benefits as members are *actually* suffering a significant First Amendment privation since petitioners do not argue that the exclusive-representation model of California's collective bargaining legislation is itself unconstitutional. There's simply not a significant speech or association problem, California asserts, especially when these nonmembers have numerous ways to express their disagreements with the union or to join educational workplace organizations that oppose the exclusive union representative and its policies.

The union respondents have any number of arguments, but one valuable one is also made by California. It deals with the role of the state as employer, and what employee speech it is constitutionally allowed to restrict. The unions remind us that Chief Justice Roberts in *Enquist v. Oregon*, 553 U.S. 591 (2006), wrote of the “crucial” constitutional difference between the government acting as a regulator (the sovereign) and acting as a manager (the employer) of its own “internal operation.” Roberts observed in *Enquist* that the Court has “often recognized that government has significantly greater leeway in its dealings with its employees than it does when it brings its sovereign power to bear on citizens at large.”

Many different kinds of First Amendment workplace cases have applied this principle. Their reasoning was an indirect piece of *Abood*‘s undergirding and its progeny, but not of particular interest to Justice Alito's recent analysis in *Knox* or *Harris*. Nearly every Court decision in this area of labor law has recognized the general principle of subordination of employees' rights to those of the state, and the unions' brief asks, what has changed?

The union's brief further explains that employee speech is only protected from state regulation when it is about a matter of public concern and when the employee is speaking as a citizen. Even if protected, it then is balanced against the governmental employer's right to maintain efficiency and avoid disruption. If a speaker is speaking as a dissatisfied employee, union or nonunion, about workplace-related matters, the unions argue, there is no longer a need, after *Garcetti v. Ceballos*, 547 U.S. 410, 24 IER Cases 737 (2006) (4 WLR 693, 6/2/06) to even balance the governmental interest against that of the speaker. There

is no clear employee First Amendment right in these situations that is identifiable after *Garcetti*, and hundreds of post-2007 federal district court and appellate court decisions confirm this assertion, they argue.

At oral argument, Justice Elena Kagan, who dealt extensively with the Court's recent restrictions on employee speech in public workplaces in her *Harris* dissent, had a difficult time in her attempts to contest this part of petitioners' First Amendment explanations. During questioning of petitioners' counsel by Kagan and other sympathetic colleagues, Justices Kennedy, Roberts and Scalia frequently intervened to recharacterize her hypotheticals in ways that suggested that *Garcetti* and its progeny did not apply to the First Amendment restrictions “experienced” by the Friedrichs petitioners.

Who Else Sees This Case as Important?

The Court's grant of certiorari generated a remarkable response from a very wide range of interested parties. Some of the individuals and/or institutions who filed amicus briefs are mentioned below so the reader may get a sense of the various legal, political, and policy interests that are at stake in this case's outcome.

Petitioners' supporters include at least 20 different states whose legislatures have enacted laws on both sides of this question. Generally, these briefs argue that public-sector collective bargaining differs little from lobbying, and that this “lobbying” has considerable impact upon scarce public resources that greatly impact public policy considerations. The ability of unions to “shape” these policy outcomes is possible by virtue of the same state governments mandating at least agency fee payments by nonmembers that help to finance them. States acting this way, these supporters argue, are essentially coercing employees who do not favor their union's “lobbying/bargaining” effort to associate with their union's political agenda and to advance it.

Former governmental officials, think tanks, foundations and law professors have also filed separate briefs in support of petitioners, arguing that mandatory agency fees have given unions a disproportionate voice in public affairs, have ensured an inefficient and ineffective educational process, and have harmed disadvantaged school children, ostensibly by sustaining workplace job security measures for teachers.

A final grouping of amici that support petitioners includes the Buckeye Institute and the Mackinac Center for Public Policy, which cite examples of union growth and decline after right-to-work legislation was passed and assert that public sector unions' abilities to collect dues and otherwise be influential without state intervention or legislative “coercion” is quite possible and even likely, further tearing at the underpinnings of the constitutional balancing that *Abood* embodies.

At one or two key junctures in the oral argument, the justices used some of this thinking, crafting questions that suggested that since unions were so successful in representing the views of their members, as evidenced by the fact that only a small percentage of employees are free riders, unions should have no problem collecting dues from nonmembers if dues are not deducted by the state.

Respondents' supporting amici briefs are equally forceful and number 24, the same as filed on behalf of the petitioners. They include civil rights organizations, law professors, trade unions, union affiliate organizations, state governments and a few others.

A number of the government-related amici argue that states have created their own statutory approaches to the workplace rights of public employees and that *Abood*‘s constitutional deference to those regulatory choices still makes considerable sense. In some instances, these various amici stress that there is an important states’ rights issue inherent in the constitutional balancing and compromise that *Friedrichs* seeks to alter.

Other governmental briefs, as well as other amici, stress that the Court's majority has never held valid a

key part of petitioners' argument: that state-mandated union dues payments by nonmembers elicit strict scrutiny. Given that the *Harris* decision failed to reach that conclusion as to the in-home personal assistants who were found not even to be “full-fledged” public employees in that case, these amici insist that this critical, needed element of First Amendment analysis is certainly not present here.

We also see a number of workplace-specific amici briefs that argue that labor-management cooperation schemes in law enforcement, firefighting and hospital settings, often initiated or strongly supported by public-sector unions, would be jeopardized by the decrease in union funds available to accomplish and monitor these initiatives. These amici and others argue that overruling *Abood* will fragment the public workplace, greatly complicate traditional and alternative dispute resolution, and make widespread, efficient, and expedited implementation of workplace changes nearly impossible as the concerted qualities of unions in these critical public workplaces will be shattered.

Finally, other amici supporting respondents argue that overruling *Abood* will undermine the compulsory bar dues cases, principally *Keller v. State Bar of California*, 496 U.S. 1 (1990) and its progeny, as well as call into question much about the key First Amendment line of cases that follow *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 1 IER Cases 8 (1968). The significant amount of litigation they predict will occur challenging the continuing vitality of these two key First Amendment linchpins alone, given the rather limited speech and association burdens at issue, compels these amici to conclude that overruling *Abood* would further destabilize First Amendment public workplace jurisprudence, all for an inexplicable constitutional reason.

What Is Happening Here?

The fact that the U.S. Supreme Court granted certiorari in *Friedrichs* after its recent decisions in *Knox* and *Harris* means that *Abood* is in plenty of trouble. The longstanding consensus, which balances an actual but modest infringement on nonmembers' association and speech rights with a union's need to pay for the services it renders to all in a bargaining unit, is in question.

These cases represent a significant shift in the Court's thinking, and it has happened very quickly. Only six years ago, the Court decided *Locke v. Karass*, 555 U.S. 207, 185 LRRM 2833 (2009) (7 WLR 128, 1/23/09)(, unanimously approving as constitutional, charging nonmembers service fees that included charges for the affiliation fees that local unions paid to their national counterparts. In doing so, the *Locke* Court both strengthened and clarified its 1991 *Lehnert* decision, which somewhat expanded (but in a plurality opinion) the notion of chargeable administrative costs and also reiterated its long-standing adherence to *Abood.*

What is puzzling is that this new First Amendment jurisprudence, ably designed by Justice Alito in his opinions in *Knox* and *Harris,* does not appear to rest on the kinds of significant new empirical information or changed social perspectives that usually explain why a constitutional precedent should be jettisoned. This is not the situation that Justice Kennedy wrote about in 2003 when the Court reversed its 1986 precedent, *Bowers v. Hardwick*, 478 U.S. 186 (1986), in *Lawrence v. Texas*, 537 U.S. 1102 (2003). There, Kennedy noted that the reversal and overturning of precedent occurred in part because the Court learned that certain of its reasoning and the facts upon which it relied were mistaken or inaccurate. That's not the case here.

Instead, the new jurisprudence reflects an active change of focus toward “individual” rights that has an effect of undermining the ability of public employees to accomplish collective objectives. Collective bargaining and union representation require a funding source, and that source must be the employees who receive the benefits of union representation. But *Knox* and *Harris* and the petitioners in *Friedrichs* would make raising those funds as difficult as possible, even when state governments believe it is in their own best interests. This indifference towards state's rights, the distaste shown by Justice Alito and the *Friedrichs* petitioners towards the compromise thinking in *Abood*, and the apparent rush of the Court to consider altering the careful First Amendment balance still alive in *Locke* suggest an exaltation of

individual rights over the common weal that is not particularly well-explained.

Other Questions in Play

Part of the problem associated with the lack of a convincing explanation may be tied to the lack of discovery in this case. Although the Respondent unions in *Friedrichs* moved for discovery opportunities at both the trial and appellate levels below, the courts denied these requests.

This is significant because *Harris* specifically requires unions to make a showing of and explain the costs they incur in representation of all employees, and a critical fact remains whether and how payments by fair-share nonmembers make possible unions' ability to provide services to all employees. It does not seem that the Court can answer the specific question it posed and answered negatively in *Harris* without remanding the case for discovery. [1]

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[1] This analysis of the importance of the lack of discovery in this case is well-described by Professor Catherine Fisk in a SCOTUS blog entry dated August 26, 2015. See http://www.scotusblog.com/2015/08/symposium-the-friedrichs-petition-should-be-dismissed/

The Oral Argument

Many court commentators wondered where Justice Scalia would place his vote. After all, his concurrence in *Lehnert* and his votes (save for *Harris* and *Knox*) to date on nearly all of these dues-related cases have expressly or implicitly accepted the *Abood* compromise. Justice Scalia seemed to believe that restricted fair share fees were only a minor *and* acceptable infringement of nonmembers' rights.

Some observers thought he *joined* the majority in *Knox* because its holding on the substantive issue *did* involve a union compelling nonmembers to pay union dues for non-chargeable expenses that were overtly political. Likewise, some thought Justice Scalia *may* have voted with the majority in *Harris*, which distinguished *Abood,* because *Harris* did not implicate traditional “chargeable or administrative expenses” of collective bargaining and because the employees in *Harris* were not “full-fledged” public employees.

The oral argument in *Friedrichs* left one with a very different understanding of Justice Scalia's views on this subject. Scanning his questions and comments, one does not find hints of his *Lehnert* thinking or *Locke* vote anywhere. Rather, we see a Justice Scalia convinced of the validity of arguments that equate collective bargaining with political speech and significant infringement of petitioners' First Amendment rights. If his comments about those issues reveal that Justice Scalia now believes that overturning *Abood* makes constitutional sense, it is tough to see how *Abood* will remain good law.